Supreme Court, U.S.
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No. 94-1991

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TRIOMPHE INVESTORS,
Petitioner,

v.

CITY OF NORTHWOOD, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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Respondents the City of Northwood, James Crane, Patricia Belknap, John Melnyk, Raymond Lark, and John E. Blair (hereinafter "Northwood") submit this Brief in Opposition to the Petition for a Writ of Certiorari in this case.

STATEMENT OF THE CASE

The critical facts are accurately outlined in the lower court opinions (Petition at 2a-4a and 15a-21a). Two matters from Petitioner's Statement require clarification:

- Northwood never agreed, either expressly or impliedly, that Petitioner could build condominiums. Northwood never represented that a special use permit would issue to allow Petitioner to build condominiums.

- Petitioner's financial difficulties arose prior to the denial of this special use permit because of the failure of other unrelated ventures. The denial of the special use permit was not the cause of those financial difficulties.

SUMMARY OF THE ARGUMENT

Petitioner claims that this Court has not established the standard of review to be applied in challenges to local zoning decisions and that the standard applied by the Sixth Circuit Court of Appeals in this case was incorrect. Both claims are meritless.

This Court established a rational basis standard of review in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) which has been followed by this Court and the

Courts of Appeals since that time. Moreover, the Sixth Circuit properly applied the rational basis test to the zoning decision at issue here.

Petitioner's remaining arguments regarding implied contracts, "unfounded community sentiment," and collateral estoppel are all attempts to distract this Court from the central issue involved: namely, whether Northwood's decision had a rational basis. It did, and this case raises no issue for this Court to review.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. THIS COURT HAS ALREADY ESTABLISHED A RATIONAL BASIS STANDARD OF REVIEW FOR CHALLENGES TO LOCAL ZONING DECISIONS.

Contrary to Petitioner's assertion, this Court has established that zoning challenges will be judged under a rational basis test. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), this Court found a zoning ordinance constitutional because it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." That holding was reinforced by this Court in *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) in which this Court applied the same test.

In 1974, this Court held that zoning decisions survive constitutional challenge "if the law be '"reasonable, not arbitrary"' and bears 'a rational relationship to a [permissible] state objective.'" *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). Even more recently, this

Court recognized that absent a claim of invidious discrimination, zoning is subject only to "the generous *Euclid* test, recently reaffirmed in *Belle Terre*." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977). Thus, this Court has consistently applied a rational basis standard of review to zoning challenges outside the arena of racial or other invidious discrimination.[1]

Moreover, the Sixth Circuit applied this standard of review to the zoning decision at issue. Even though the Sixth Circuit found Petitioner did not have the requisite property interest to bring a zoning challenge (discussed *supra*), the Court of Appeals nevertheless stated "[w]e cannot say that the City Council acted irrationally denying the permit." (Petition at 7a). Further, the Court of Appeals held "[i]n light of the substantial problems with the earlier condominium project, there was a reasonable basis for denying the permit." (Petition at 7a). Plainly, the Court of Appeals held Northwood's decision had a substantial and rational relationship to its permissible objectives.[2]

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[1] While claiming this Court has not established the standard of review for zoning claims, Petitioner recognizes "it is akin to a 'rational basis' test." (Petition at 25). Thus, Petitioner has no quarrel with this standard of review, especially here where no racial or other animus has ever been alleged.

[2] Collateral estoppel based on the state court decisions was not warranted because Judge Zatkoff (and then the Sixth Circuit) applied this deferential standard of review. Collateral estoppel only applies to issues "actually and necessarily litigated and determined" in a prior action between the same parties. *Schomaeker v. First National Bank*, 66 Ohio St. 2d 304, 313 (1981). The state courts did not determine whether the zoning decision here had a rational basis and therefore collateral estoppel does not exist. *See, e.g., Pearson*, 961 F.2d at 1221 ("[S]tate court

Moreover, Petitioner's claim that Northwood's decision was not rational because it was based on "unfounded community sentiment" (Petition at 24) is without merit. This Court has long recognized that community concerns are at the heart of zoning decisions. *Euclid*, 272 U.S. at 386-87, 394. This continues to be the case. *See, e.g., Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667, 685 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992) (community sentiment based on legitimate state interests such as traffic, safety, crime, community pride, and noise is an appropriate consideration in zoning decisions); *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 665-66 (4th Cir. 1989) (community sentiment regarding traffic, noise, odors, health concerns, community pride and spirit is a proper basis for zoning decision); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1224 (6th Cir. 1992) (community sentiment regarding traffic and over commercialization provided rational basis for zoning decision). Here, Northwood based its decision on legitimate community concerns regarding the poor condition of the existing units, surface water problems, lack of recreational area, adverse effect on property values, traffic volume, and the availability of space in the local schools. These are exactly the concerns zoning is designed to address and a decision based on such concerns is proper.

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scope of review of a decision of a state administrative agency is far broader than the federal scope of review under substantive due process.")

II. THERE IS NO CONFLICT AMONG THE CIRCUITS WHICH REQUIRES REVIEW BY THIS COURT

Petitioner's claimed conflict among the circuits on this issue is overstated. While different circuits may use slightly different language, the fundamental test remains whether the decision was arbitrary or capricious with no rational relationship to the local government's legitimate goals. *Euclid*, 272 U.S. at 395. That test was applied by the Sixth Circuit in this case and has also been applied in the following cases cited by Petitioner in support of its argument that a conflict exists. *See, e.g., Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir.), *cert. denied*, 502 U.S. 866 (1991); *Brady v. Town of Colchester*, 863 F.2d 205, 215 (2d Cir. 1988); *Midnight Sessions Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988); *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 221 (8th Cir. 1990); *Southern Pacific Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1119-20 (10th Cir. 1991); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1374-75 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1400 (1994). *See also Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992).

Some circuits require a property interest in order to state a substantive due process claim, and some do not. *Compare RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 919 (2d Cir. 1989); *Jacobs*, 927 F.2d at 1119;

Silver v. Franklin Township, Board of Zoning Appeals, 966 F.2d 1031, 1036 (6th Cir. 1992) (requiring a "legitimate claim of entitlement") *with De Blasio v. Zoning Board of Adjustment*, 53 F.3d 592, 600-01 (3d Cir. 1995); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 193 (1994); *Eide v. Sarasota County*, 908 F.2d 716, 723-26 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) (not requiring a legitimate claim of entitlement). *See generally*, Fred Bosselman and Chris Lee, *Update on Substantive Due Process in Land Use Cases in the Federal Courts*, C629 ALI-ABA 311 (1991) (giving overview of substantive due process decisions). However, the essential test remains the same: Did the local zoning agency have a rational basis for the zoning decision? Thus, the *Euclid* test is applied by all the circuits.

III. FURTHERMORE, AND IN ANY EVENT, A LIBERTY OR PROPERTY INTEREST IS PROPERLY REQUIRED AS A PREREQUISITE TO A ZONING CHALLENGE

In *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court held that a due process claim must be founded on "a legitimate claim of entitlement." *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601. Although those cases involved procedural due process challenges, both substantive due process and procedural due process are simply components of the same constitutional doctrine. Thus, requiring a property or liberty interest to state either type of due process claim is appropriate under *Roth* and *Perry*. *See, e.g., RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 919 (2d Cir. 1989); *Jacobs, Visconsi & Jacobs v. City of*

Lawrence, 927 F.2d 1111, 1119 (10th Cir. 1991); *G.M. Engineers and Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 331 (6th Cir. 1990) (requiring a "legitimate claim of entitlement" to support a due process claim). This requirement is also entirely consistent with the federal courts refusal to become federal boards of zoning appeals. *See, e.g., Belle Terre*, 416 U.S. at 8 (Douglas, J., for the majority) and 13 (Marshall, J., dissenting); *Pearson*, 961 F.2d at 1222; *RRI*, 870 F.2d at 918; *Gardner*, 969 F.2d at 69.

Plainly, Petitioner had no "legitimate claim of entitlement." Northwood retained the discretion to grant or deny a special use permit. Northwood City Ordinance §1226.09 ("A special use permit may be granted . . . .") (Petition at 10a-11a). Further, Northwood never agreed that a special use permit would be granted. As noted by the District Court, "conspicuously absent from the purchase agreement was a clause making the purchase of the land contingent upon plaintiffs obtaining a special use permit." (Petition at 30a).

Finally, the requirement of a property interest in this case has not prejudiced Petitioner's attempts to have the zoning decision at issue reviewed by the Sixth Circuit. Rather, the Sixth Circuit applied the rational basis test to this zoning decision, even though no property interest exists, and found it passed muster under that standard. As such, there is simply no issue for this Court to review.

CONCLUSION

Plaintiff has had adequate review of the zoning decision at issue. There is no new standard for this Court to announce. The Petition should be denied.

Respectfully submitted,

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